No. 91-2059

Supreme Court, U.S.
FILED
SEP 4 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

CEDARMINN BUILDING LIMITED PARTNERSHIP, MINNCEDAR LAND LIMITED PARTNERSHIP, ROCKMINN LEASING CORPORATION and MIDUNITED BUILDING COMPANY,

Petitioners,

vs.

RESOLUTION TRUST CORPORATION, as Receiver for Midwest Savings Association, F.A.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONERS' REPLY BRIEF

ROGER B. KAPLAN
Counsel of Record
WILENTZ, GOLDMAN & SPITZER
A Professional Corporation
90 Woodbridge Center Drive
Woodbridge, New Jersey 07095
(908) 636-8000

ROBERT R. WEINSTINE
WINTHROP & WEINSTINE
3200 World Trade Center
St. Paul, Minnesota 55101
(612) 290-8400

EUGENE GRESSMAN
Seton Hall University
School Of Law
1111 Raymond Boulevard
Newark, New Jersey 07102
(201) 642-8844

Counsel for Petitioners

1931
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

TABLE OF CONTENTS

Page

Argument 2

I. The Importance Of The Questions Presented..... 2

II. The Plain Meaning of Section 1821(e)(2) 2

III. The Inapplicability of *Chevron* Deference 4

Conclusion 8

TABLE OF CITATIONS

Cases Cited:

American National Red Cross v. S.G., ____ U.S. ____, 112 S. Ct. 2465 (1992)..... 6

Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988) 5, 6

Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 4, 5, 6

FDIC v. Philadelphia Gear Corporation, 476 U.S. 426 (1986) 5

Martin v. Occupational Safety and Health Review Commission, ____ U.S. ____, 111 S. Ct. 1171 (1991) 5

Contents

Page

Patterson v. Shumate, ____ U.S. ____, 112 S. Ct. 2242 (1992), *reh'g denied*, 1992 U.S. LEXIS 4781 (August 18, 1992) 4

Whirlpool Corp. v. Marshall, 445 U.S. 1 (1980) 5

Statutes Cited:

12 U.S.C. § 1441a(b)(12) 5, 6

12 U.S.C. § 1821(d)(14)(B) 4

12 U.S.C. § 1821(e) 3, 5, 7

12 U.S.C. § 1821(e)(2) ..... passim

APPENDIX

Reprint from Federal Register / Volume 55, No. 74, Page 14368 / Tuesday, April 17, 1990 / Notices 1a

No. 91-2059

In The

Supreme Court of the United States

October Term, 1992

CEDARMINN BUILDING LIMITED PARTNERSHIP, MINNCEDAR LAND LIMITED PARTNERSHIP, ROCKMINN LEASING CORPORATION and MIDUNITED BUILDING COMPANY,

Petitioners,

vs.

RESOLUTION TRUST CORPORATION, as Receiver for Midwest Savings Association, F.A.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETTIONERS' REPLY BRIEF

Petitioners respectfully submit this Brief in reply to the Solicitor General's Brief in Opposition.

ARGUMENT

I. The Importance Of The Questions Presented

In its Brief in Opposition ("Opp."), the government seeks to minimize the importance of the questions presented in the Petition by noting that the statutory section at issue, 12 U.S.C. § 1821(e)(2), has been the subject of only four other reported District Court decisions. Opp. at 10. But the number of decisions has nothing to do with the importance of the questions. As the government argued in the Eighth Circuit, this case "presents an important question . . . because the answer will have enormous impact on federal receivership powers" (RTC's Eighth Circuit Brief at 1). In other words, the importance of this case lies in the fact that the answer given to the statutory issues in this case will have "enormous impact" on the countless leases and contracts entered into with hundreds of institutions involving billions of dollars "with importance well beyond this particular case" (*id.* at i, 7 and App. A). These issues thus create substantial problems in the administration of § 1821(e)(2).[1]

II. The Plain Meaning of Section 1821(e)(2)

A. The government argues that "the use of the disjunctive term 'or'" (Opp. at 11) in § 1821(e)(2) supports the RTC's interpretation of that section. However, the government's Brief in Opposition ignores the express disjunctive in the statute and argues that the statute should be construed in the *conjunctive*, by claiming that "the conservator *and* the receiver each has an independent power" to repudiate within a reasonable time (Opp. at 11) (emphasis added). Indeed, throughout its Brief the government consistently states its

---

1. Indeed, the government noted in the Eighth Circuit that "[i]t is very likely that most, if not all of the remaining conservators will be ultimately replaced by receivers" who will then exercise repudiation powers over a vast number of leases and contracts (*id.* at i).

position in the *conjunctive* (Opp. at 7-11), directly contrary to the statutory disjunctive. The plain meaning of the statutory disjunctive "or" in Section 1821(e)(2) can only be that *either* the conservator *or* receiver for a financial institution, whichever is appointed, shall determine whether or not to repudiate within a reasonable period after appointment.

B. The government's reliance on the purported distinction between RTC's role as conservator and receiver is also misplaced. The undisputed record demonstrates that no such distinction was observed in this case, since FSLIC and the RTC as both conservators and receivers consistently were working to liquidate the institution regardless of the "hat" being worn. Indeed, the government's Brief in Opposition acknowledges that, at least as early as May 1989 — seventeen months before RTC's repudiation of the Leases at issue — FSLIC, and then RTC, were working "[t]o carry out the liquidation of Midwest" (Opp. at 3). Thus, the distinction which the government now seeks to draw between RTC's role as conservator and receiver simply elevates form over substance and ignores the undisputed facts of this case.

C. The government's Brief in Opposition also ignores the undisputed fact that the Leases at issue were repudiated by the *second* receiver, whose appointment followed the *second* conservator. Thus, the government argues not only that *both* a conservator *and* receiver may independently exercise the repudiation power, but that this power may be passed indefinitely to any number of subsequent conservators and receivers. This argument is unsupported by any reading of the plain language of § 1821(e).

D. Indeed, the government's theory of multiple, independent, renewable repudiation powers for any number of conservators and receivers would permit the RTC or FDIC, first as conservator, to repudiate within a reasonable period followed by a period during

which the repudiation power is expired. If, then, the RTC or FDIC replaces the conservator with a receiver, the repudiation power could be resuscitated for another reasonable period, followed by yet another period during which the power again expires. Upon appointment of a second, third or subsequent conservator or receiver, the "on again, off again" repudiation power would repeat itself. This anomalous result makes meaningless the "reasonable period" requirement in the statute, the plain meaning of which is to limit agency discretion and provide certainty and predictability.[2]

E. The government's attempt to distinguish FIRREA's statute of limitations provision, 12 U.S.C. § 1821(d)(14)(B) (Opp. at 13-14), misses the point. FIRREA's limitations provision is similar to the provision at issue (§ 1821(e)(2)) in that both provisions place temporal restrictions upon the discretion of the "conservator or receiver" specifying a period of time following appointment. Thus, consistency of meaning and interpretation should be presumed by this Court in this regard. *Patterson v. Shumate*, ___ U.S. ___, 112 S. Ct. 2242, 2247 n.2 (1992), *reh'g denied*, 1992 U.S. LEXIS 4781 (August 18, 1992). It is indisputable that, to permit multiple, independent, renewable limitations periods would render the statute of limitations provision meaningless, as the government concedes. It is also apparent that such a reading of the repudiation provision in § 1821(e)(2) would produce an equally untenable result.

III. The Inapplicability of *Chevron* Deference

A. The government contends that under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), an

---

2. Notwithstanding the government's reassurance that RTC would not "disregard its statutory duties" in this manner (Opp. at 13 n.6), the RTC's interpretation of the statute would authorize the RTC and FDIC indefinitely to resuscitate the repudiation power.

agency's litigation position should be accorded *Chevron* deference simply because the agency consistently advances and adheres to that position (Opp. at 17). The government seeks to distinguish this Court's decision in *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988), by relying on inapposite cases. Specifically, in *FDIC v. Philadelphia Gear Corporation*, 476 U.S. 426 (1986) (*see* Opp. at 17), this Court accorded *Chevron* deference to the FDIC's long-standing, fifty year old interpretation of the FDIC Act which, although not reduced to a specific regulation, had been consistently articulated and applied by the agency. The Court also observed that Congress had specifically noted, approved and preserved the FDIC's long-standing interpretation in several amendments to the FDIC Act. *Philadelphia Gear, supra*, at 431. None of the factors present in *Philadelphia Gear* exist in the present case, and, thus, the government's reliance upon *Philadelphia Gear* is misplaced.

Similarly, in *Martin v. Occupational Safety and Health Review Commission*, ___ U.S. ___, 111 S.Ct. 1171 (1991), also relied upon by the government (Opp. at 17), this Court held that *Chevron* deference could be accorded to a consistent agency intepretation established in formal, agency adjudicatory proceedings. In *Martin*, this Court held that an agency interpretation "*in an administrative adjudication*" is entitled to deference, given that the interpretation "assumes a form expressly provided for by Congress." *Martin, supra*, 112 S. Ct. at 1179. In the present case, the RTC's purported interpretation of § 1821(e) was not the product of any administrative adjudicatory proceeding. In this regard, the RTC's "interpretation" fails to meet the rule-making requirements set forth in the RTC's enabling statute, 12 U.S.C. § 1441a(b)(12) (Opp. at 18 n.8) and, thus, plainly does not "assume a form expressly provided for by Congress." Thus, rather than supporting the government's position, *Martin* undermines it.[3]

---

3. The remaining cases cited by the government are inapposite. *Whirlpool Corp.*

(Cont'd)

B. Contrary to the government's suggestion, the record in this case establishes that the RTC never raised the issue of *Chevron* deference before the District Court, and did not argue or suggest in the District Court that there was a pre-existing agency interpretation on point. Nor had the RTC sought in other litigated cases to advance its purported "interpretation," although the issues before the district courts in those cases were substantially identical to those presented here (Opp. at 15). The sudden, after-the-fact appearance of the "Statement of Policy" to buttress its litigation position in the Court of Appeals thus underscores the *post hoc* nature of the RTC's "interpretation" which should be entitled to no deference under *Bowen v. Georgetown, supra*.

C. Petitioners do contend, and the government does not dispute, that the procedural requirements set forth in RTC's enabling statute (12 U.S.C. § 1441a(b)(12)) were not met in connection with the purported "Statement of Policy" unveiled by the RTC before the Eighth Circuit. Thus, although a "Notice of Adoption" of the Policy Statement was published in the Federal Register (*see* App. A hereto), the Statement itself was never published, and none of the other requirements of the Administrative Procedure Act were satisfied by the RTC as required by § 1441(b)(12). Nor was the Policy Statement ever submitted to the Oversight Board, also as required by the RTC's enabling statute, § 1441(b)(12).

D. Moreover, substantively, the RTC's proffered interpretation did not even purport to construe the statutory provision at issue (§1821(e)(2)), but rather dealt with wholly unrelated matters. In

---

(Cont'd)

v. Marshall, 445 U.S. 1 (1980) (Opp. at 18) addressed the issue of deference (prior to *Chevron*) to a *formal regulation* duly promulgated by the Secretary of Labor (*id.* at 3). *American National Red Cross v. S.G.*, ___ U.S. ___, 112 S. Ct. 2465 (1992) (Opp. at 14), has nothing whatever to do with the *Chevron* issue.

this regard, the Notice of Adoption of the Policy Statement set forth in the Federal Register (*see* App. A hereto) cited for the first time in the government's Brief in Opposition (Opp. 18 n.18), provides no notice that the RTC had adopted any policy concerning repudiation powers under the statutory provision at issue, 12 U.S.C. § 1821(c).

CONCLUSION

For all the foregoing reasons, and for the reasons set forth in the Petition, certiorari should be granted on the questions presented.

Respectfully submitted,

ROGER B. KAPLAN
Counsel of Record

WILENTZ, GOLDMAN & SPITZER
A Professional Corporation
90 Woodbridge Center Drive
Woodbridge, New Jersey 07095
(908) 636-8000

ROBERT R. WEINSTINE
WINTHROP & WEINSTINE
3200 Minnesota World Trade Center
St. Paul, Minnesota 55101
(612) 290-8400

EUGENE GRESSMAN
SETON HALL UNIVERSITY
SCHOOL OF LAW
1111 Raymond Boulevard
Newark, New Jersey 07102
(201) 642-8844

Counsel for Petitioners

September 8, 1992

APPENDIX A - REPRINT FROM FEDERAL REGISTER/ VOL. 55, NO. 74, PAGE 14368/ TUESDAY, APRIL 17, 1990/ NOTICES

RESOLUTION TRUST CORPORATION

Notice of Adoption: Policy Statement Regarding the Payment of Interest on Direct Collateralized Obligations After Appointment of the Resolution Trust Corporation as Conservator or Receiver

SUMMARY: Notice is hereby given that on April 10, 1990, the Resolution Trust Corporation ("RTC") adopted a policy statement regarding the payment of interest on direct collateralized obligations after appointment of the RTC as conservator or receiver. Copies of the policy can be obtained from the RTC.

ADDRESSES: Copies of the policy can be obtained by writing to the Executive Secretary, Resolution Trust Corporation, 550 17th Street, N.W., Washington, DC 20429. Requests for copies may also be made to Phyllis Beard at (202) 898-3873.

FOR FURTHER INFORMATION CONTACT:

Rex Veal, Special Counsel, Resolution Trust Corporation (202) 416-2389.

Dated: at Washington, DC, this 10th day of April, 1990.

Resolution Trust Corporation.

John M. Buckley, Jr.,

Executive Secretary.

[FR Doc. 90-8894 Filed 4-15-90: 8:45 am]

BILLING CODE 6714-01-M